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ESTATE OF NEKIYLO DWAYNE GRAVES, by and through Eureka Graves as next-of-kin, personal representative and appointed Special Administrator SHANNON L. EVANS; EUREKA GRAVES, an individual,

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Plaintiffs,

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vs.

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NYE COUNTY, NEVADA; JOHN KAKAVULIAS, an individual and employee of Nye County, Nevada; SOC NEVADA LLC, a foreign limited liability company d/b/a SOC, LLC; TREQUIS HARRIS, an individual and employee of SOC Nevada, LLC; DOES I - X; ROES I - X,

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Defendants.

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Case No.: 2:20-cv-02359-JAD-DJA

**THE NYE COUNTY  
DEFENDANTS' REPLY IN  
SUPPORT OF MOTION TO  
DISMISS (#54) PLAINTIFFS' FIRST  
AMENDED COMPLAINT (#35)**

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COMES NOW, Defendants NYE COUNTY and DEPUTY JOHN KAKAVULIAS (hereinafter, the "Nye County Defendants"), by and through their Attorneys of Record, ERICKSON, THORPE & SWAINSTON, LTD., BRENT L. RYMAN, ESQ., and PAUL M. BERTONE, ESQ., and hereby present the following Reply in Support of their Motion to Dismiss (#54) brought pursuant to FRCP Rule 12(b)(6) and FRCP Rule 12(b)(1).

## **MEMORANDUM OF POINTS & AUTHORITIES**

## I. PRELIMINARY MATTERS

#### A. The Federal Enclave status of NNSS cannot be ignored.

4 As an initial matter, these Defendants feel compelled to address the “federal enclave”  
5 status of the Nevada National Security Site. The effect of said “federal enclave” designation  
6 is addressed at length within these Defendants’ Joinder (#76) in the SOC Motion to Dismiss  
7 filed with court on February 11, 2022. Defendants will not repeat those arguments and that  
8 evidence here, but merely ask they be incorporated by reference herein. In sum, the thrust  
9 of “federal enclave” status is to necessarily render all acts or omissions which occur at NNSS  
10 to be federal in nature. This same principle would also tend to render all actors, including  
11 local county Sheriffs and their deputies operating pursuant to contract with the DOE, to be  
12 federal actors and agents only. “Generally, when an area in a State becomes a federal  
13 enclave, only the state law in effect at the time of the transfer of jurisdiction continues in  
14 force as surrogate federal law. . . . And going forward, state law presumptively does not  
15 apply to the enclave.” *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, \_\_ U.S.\_\_, \_\_, 139 S.Ct.  
16 1881, 1890, 204 L.Ed.2d 165 (2019) (internal citations and quotations omitted).<sup>1</sup>

17 That being said, all of Plaintiffs' claims for violating the U.S. Constitution sound in  
18 42 U.S.C. § 1983. (*See*, Pls' Compl. (#35), pp. 29-39, ll. 4-21). Our federal courts have  
19 developed a two-part test to satisfying any § 1983 action. “[P]laintiff must show both that  
20 he has been deprived of a right secured by the Constitution and laws’ of the United States and  
21 that the defendant acted under color of any statute . . . of any State . . . .” *Lugar v.*  
22 *Edmondson Oil Co.*, 457 U.S. 922, 931 (1982). “The traditional definition of acting under  
23 color of state law requires that the defendant in a § 1983 action have exercised power  
24 possessed by virtue of state law and made possible only because the wrongdoer is clothed  
25 with the authority of state law.” *Fair Maps Nevada v. Cegavske*, 463 F.Supp.3d 1123, 1138  
26 (D. Nev. 2020). Thus acting under the color of state law is required.

<sup>1</sup> Unless otherwise specifically noted, all further citation to language from case authority will be “cleaned up” (simplified) by omitting both internal citations and quotation marks which have a marked tendency to clutter the brief and/or make it more difficult to read.

1        All relevant events alleged in this suit occurred on the NNSN location. These  
 2 Defendants were only present at this “federal enclave” location due to a contract with the  
 3 DOE and due to a specialized set of regulations which allowed the mutual cooperation  
 4 between the federal security contractors (SOC and Harris) and local law enforcement  
 5 agencies. *See, e.g.*, 10 C.F.R. § 1047.3. These Defendants therefore contend that they were  
 6 necessarily federal actors, acting pursuant to federal law. And as such, they are forced to  
 7 seriously question whether 42 U.S.C. § 1983 is the proper underlying substantive doctrine  
 8 with which to support the plaintiff’s constitutional claims.

9        For example, the District of Columbia is a recognized federal enclave. *See, e.g.*,  
 10 *People v. Abdullah*, 23 Misc.3d 232, 234, 870 N.Y.S.2d 886, 887 (Crim. Ct. 2008)  
 11 (recognizing such status). It had previously been held that due to such status, it could not be  
 12 subject to § 1983 claims because the area did not fall within the meaning of “State or  
 13 Territory” as used in the statute. *See, D.C. v. Carter*, 409 U.S. 418, 425-26 (1973) (District  
 14 not a “state or territory” for purposes of right of action under § 1983). It was only due to a  
 15 subsequent special act of congress taken in response to the *Carter* decision, that the District  
 16 of Columbia was specifically brought within the aegis of § 1983. *Gary v. United States*, 499  
 17 A.2d 815, 852, n.6 (D.C. 1985). And apparently today reference to the District of Columbia  
 18 appears directly in the language of 42 U.S.C. §1983. *Id.*; (*see also*, Pls’ Opp. Brief (#75),  
 19 p. 9, ll. 23-25) (reflecting reference to D.C. in language of the statute).

20        As a federal enclave, and following the reasoning of *Carter*, NNSN is likewise neither  
 21 a “state or territory.” More critically, in the instance of the NNSN, there has been no special  
 22 act of Congress to include this enclave within the meaning of 42 U.S.C. §1983. As such,  
 23 moving Defendants submit the District Court is without jurisdiction to entertain actions  
 24 sounding in 42 U.S.C. § 1983 for events which occurred wholly on the grounds of this  
 25 federal enclave.<sup>2</sup> Therefore, and should the District Court agree with the above analysis, the

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27        <sup>2</sup>. Should Plaintiffs seek to pursue an appropriate remedy, likely candidates for proper  
 28 subject matter jurisdiction could include claims sounding under *Bivens*, or the Federal Tort  
 Claims Act or even 28 U.S.C. § 5001, which specifically allows for civil actions for deaths in a  
 place subject to the exclusive jurisdiction of the United States. “Actions under § 1983 and those  
 under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal

1 current civil rights claims, sounding in 42 U.S.C. § 1983, must fail to state claims upon  
2 which relief can be granted or otherwise be fatally flawed.

3           B. The Court enjoys discretion to consider the documents included with the  
4 Nye County Defendants' Motion to Dismiss, and referenced extensively  
in Plaintiffs' Complaint, because they are public records.

Plaintiffs object to the portions of the Motion to Dismiss referencing the NDI Report, claiming these reports contain unreliable hearsay. Plaintiffs' of course also attach similar reports and interviews to their own opposition arguments in an apparent effort to display the need for additional discovery, generate genuine issues of material fact and bolster the argument that the motion to dismiss should be converted into one for summary judgment pursuant to Fed.R.Civ.P., Rule 12(d). (*See*, Pls' Opp. Brief (#75), pp. 13-22, ll. 3-4). As will be illustrated, this Court has the discretion to properly consider the evidence submitted in support of the Motion to Dismiss, and Defendants request that it remain styled as a motion to dismiss, even if that means the Court not consider the extraneous evidence submitted in that opposition.

15        “When evaluating a motion to dismiss . . . the Court is not limited literally to the  
16 pleadings on their face, but may also consider documents either attached to or incorporated  
17 in the complaint and may take judicial notice of matters of public record that are directly  
18 relevant to the issue at hand.” *Insuremax Ins. Agencies, Inc. v. AEA Ins. Agencies, Inc.*, 2014  
19 WL 12481353, at \*8 (W.D. Tex., Nov. 6, 2014). “In ruling on a motion to dismiss, a court  
20 may consider certain materials – documents attached to the complaint, documents  
21 incorporated by reference in the complaint, or matters of judicial notice – without converting  
22 the motion . . . into a motion for summary judgment.” *HSBC Bank USA, Nat'l Ass'n as Tr.*  
23 *for Holders of Deutsche Alt-A Sec., Inc., Mortg. Loan Tr. Pass-Through Certificates Series*  
24 *2007-OA3 v. Fid. Nat'l Title Grp., Inc.*, 2019 WL 5596392, at \*2 (D. Nev., Oct. 30, 2019).  
25 “Even if a document is not attached to a complaint, it may be incorporated by reference into  
26 a complaint if the plaintiff refers extensively to the document or the document forms the

<sup>28</sup> actor under *Bivens*.” *Fulkerson v. Pub. Utilities Comm'n of Nevada*, 2020 WL 5644879, at \*3 (D. Nev., Sept. 22, 2020); *see also, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

1 basis of the plaintiff's claim." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

2 In drafting their First Amended Complaint, Plaintiffs relied upon exactly the same  
 3 factual evidence, and from exactly the same reports, upon which these Defendants relied to  
 4 craft their Motion to Dismiss. Defendants are also fairly sure that anytime a statement  
 5 appears in quotation marks within the First Amended Complaint, that wording is either  
 6 coming from the NDI Report, or the documents upon which that report is based, even though  
 7 no citation to the record is given within the pleadings. (*See, e.g.*, Pls' Compl. (#35), p. 18,  
 8 ll. 4-8) (noting that witness C.R. reported seeing an unidentified black male "waiving his  
 9 hands 'erratically' in the air . . ."). But now suddenly this same evidence is "outright  
 10 unreliable, because it is composed of multiple levels of hearsay?" (*See, Pls' Opp. (#75)*, p.  
 11 13, ll. 10-12). Why? Merely because Defendants seek to use it?

12 Plaintiffs drafted their First Amended Complaint with extensive reference to factual  
 13 dissertation appearing in the same public documents and reports upon which Defendants'  
 14 motion to dismiss relies, especially the NDI Report (which incorporated the evidence which  
 15 the FBI developed as part of its inquiry and investigation, and which the FBI then  
 16 subsequently chose to abandoned once it was determined that the events in question at NNSS  
 17 were not "terrorist" related). Frankly, from where else could this information come? *See,*  
 18 *e.g.*, Pls' Compl. (#35), p. 19, ll. 21-24 (Harris reporting to FBI investigators that Nekylo  
 19 was getting "too close" and that Kakavulias "needed to take a shot"); p. 20, ll. 4-7 (Harris  
 20 reported to FBI investigators that he fired one round into Nekylo's chest); p. 21, ll. 19-25  
 21 (complaining of NVDPS-ID OIS' failure to interview Harris, who was permitted to submit  
 22 a statement or interview provided to FBI, and noting the final NVDPS-ID OIS Report  
 23 identified Harris and Kakavulias as the shooters); p.22, ll. 22-24 (noting that FBI interviews  
 24 indicated that Nekylo talked to his mother regularly).

25 Even if these documents were submitted to prove the truth of the matter asserted and  
 26 contain hearsay, they are subject to the public records exception to the hearsay rule. *See,*  
 27 Fed.R.Evid. 803(8)(A) (providing hearsay exception for records of public agencies setting  
 28 forth matters observed pursuant to duty imposed by law as to which there is a duty to report,

1 including the factual findings from a legally authorized investigation). And since these  
 2 documents were good enough to draft the complaint, they should certainly be good enough  
 3 to support Defendant's motion to dismiss *aimed at that same complaint*. As such Plaintiffs  
 4 have failed to "show that the source of information or other circumstances indicate[s] a lack  
 5 of trustworthiness." FRE Rule 803(8)(B).

6 Plaintiffs' authentication arguments should also be rejected because the court has the  
 7 option to take judicial notice of the papers in issue. *See*, FRE Rule 201(b)(2), (c) (court has  
 8 discretion to take judicial notice of facts that are capable of accurate and ready determination  
 9 by resort to sources whose accuracy cannot reasonably be questioned); *Hay & Forage  
 Indus. v. New Holland N. Am., Inc.*, 25 F.Supp.2d 1170, 1176 n.2 (D. Kan. 1998) (applying  
 10 rule). "[A court] may take judicial notice of records and reports of administrative bodies."  
 11 *Hellmann-Blumberg v. Univ. of Pac.*, 2013 WL 1326469, at \*1 (E.D. Cal., Mar. 29, 2013).  
 12 Moreover, should the Court deem to take judicial notice of the evidence attached to the  
 13 motion to dismiss, such records should be self-authenticating within the purview of at least  
 14 one of the provisions of FRE Rule 902. *See, e.g.*, FRE Rule 902 (2)(A)&(B) (documents  
 15 signed and certified); (Defs' Mot. (#54-1), p. 2, #NYE-00003) (NDI Report reflecting the  
 16 signatures of drafting detective and the approving supervisor).

18 The documents attached to Plaintiffs' Opposition also seem to stem from the exact  
 19 same sources as those utilized by Defendants, namely either the FBI or the NDI Report. But  
 20 to whatever extent the Court may view any of the documents attached to Plaintiffs'  
 21 Opposition as to fall outside the above referenced hearsay/authentication exceptions,  
 22 Defendants ask that such evidence simply not be considered. Likewise, to the extent  
 23 Plaintiffs may be attempting to supply extraneous facts merely in an attempt to convert the  
 24 Motion to Dismiss into one for summary judgment, Defendants again respectfully request  
 25 that such evidence merely not be considered, and that the motion remain true to its current  
 26 form. *See, Zimmerman v. Berdanier*, 2008 WL 11503557, at \*2 (M.D. Pa., Jan. 25, 2008)  
 27 (one party should not be permitted to "sandbag" the other by improper submission of  
 28 affidavit and other new evidence in attempt to convert a motion to dismiss into one for

1 summary judgment); *Blanford v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 2009 WL  
 2 500527, at \*1 n.1 (S.D. Ind., Feb. 27, 2009) (it is “neither fair nor appropriate” for party to  
 3 try to convert its own motion to dismiss into one for summary judgment by attaching  
 4 evidence to reply brief); *Truhlar v. John Grace Branch No. 825 of the Nat'l Ass'n of Letter  
 5 Carriers*, 2007 WL 1030237, at \*10 (N.D. Ill., Mar. 30, 2007) (conversion to summary  
 6 judgment is ordinarily considered at the instance of a moving defendant, not a responding  
 7 plaintiff); *McFadden v. Krause*, 2006 WL 8439342, at \*3 n.1 (D. Nev., Feb. 15, 2006)  
 8 (refusing to consider documents attached as extraneous exhibits to reply brief and thereby  
 9 convert a Rule 12(b)(6) motion into one for summary judgment).

10 For the above reasons, the Court may appropriately consider the documents which  
 11 Defendants have attached to their motion to dismiss. Having exhausted the prefatory issues,  
 12 defendants will now move into the substantive arguments supporting the Motion to Dismiss  
 13 based on FRCP Rules 12(b)(1) and 12(b)(6).

14 **II. LEGAL ARGUMENT**

15       **A. Plaintiffs have failed to identify a single ounce of precedent finding a  
 16 constitutional violation under similar circumstances that could have put  
 these officers on notice their conduct was illegal.**

17       As pointed out in the underlying motion, the Supreme Court has very recently clarified  
 18 the precise standards which **must** be employed to determine if a law enforcement officer is  
 19 entitled to successfully assert a qualified immunity defense against a Fourth Amendment  
 20 claim for excessive force. (*See*, Defs' Mot. Dismiss (#54), p. 12, ll. 3-9). Plaintiffs have  
 21 either chosen to ignore this new standard or, more likely, could not find any case law to fit  
 22 the bill. Either way, Plaintiffs' failure to comply with and satisfy this new standard should  
 23 be fatal to their Fourth Amendment claims.

24       To reiterate, to thwart Defendant Kakavulias' claim of qualified immunity by showing  
 25 a violation of clearly established law, Plaintiffs must “identify a case that put [the officer] on  
 26 notice that his specific conduct was unlawful.” *Rivas-Villegas v. Cortesluna*, \_\_U.S.\_\_,  
 27 \_\_, 142 S.Ct. 4, 8, 211 L.Ed.2d 164 (2021). In other words, Plaintiffs must point to a case  
 28 showing sufficient factual similarity so as to put the incident in question “beyond the

1 otherwise hazy borders between excessive and acceptable force and thereby provide an  
 2 officer notice that a specific use of force is unlawful.” *Id.*, 142 S.Ct. at 9. As such, and as  
 3 made plain by *Cortesluna*’s sister decision, where the plaintiff failed to identify a single  
 4 precedent finding a Fourth Amendment violation under similar circumstances, the officers  
 5 were unquestionably entitled to qualified immunity. *City of Tahlequah, Oklahoma v. Bond*,  
 6 \_\_\_ U.S. \_\_\_, \_\_\_, 142 S. Ct. 9, 12, 211 L. Ed. 2d 170 (2021).

7       Here, one cannot remove from consideration the fact that some of the nation’s  
 8 thermonuclear weapons or other similar type nuclear nightmares were at stake. For those few  
 9 minutes, the entire nation’s security was placed at risk due to Mr. Graves’ unfortunate  
 10 decision to run the gate, run from officers, and finally ignore the frantic, screaming  
 11 commands from officers – who had weapons trained on him – which would have saved his  
 12 life. The risks incumbent to the NNSS area itself demand immediate action to neutralize any  
 13 danger posed by unauthorized and hostile intruders. By disobeying the officers’ commands  
 14 and continuously walking at them, Mr. Graves’ conduct demanded immediate action and  
 15 forced the officers to make that split second-decision which is now being questioned. But  
 16 the officers’ response was proportional to the gravity of the danger presented. And unless  
 17 and until the Fourth Amendment demands that these officers engage in hand-to-hand combat,  
 18 which the presence of the brass-knuckle knife bodes may have ended badly, their decisions  
 19 to pull their triggers, especially while not knowing if this was a terrorist attack directed  
 20 against the facility, must be afforded qualified immunity protection.

21       This request for qualified immunity is of course supported by the fact that Plaintiffs  
 22 have failed to cite any case law remotely similar to this one. They have failed to cite any case  
 23 where an unauthorized intruder placed high-security, highly sensitive strategic nuclear  
 24 stockpiles/weapons at risk, disrupted the operation of the entire base, fled from security  
 25 forces and otherwise would not obey the officers commands, and then lived to tell the tale  
 26 because the officers were forced to wrestle the assailant to the ground in order to comply  
 27 with the Fourth Amendment as a constitutionally valid arrest. That failure is probably  
 28 because such a case does not exist. And as such, these officers had nothing to alert them that

1 their conduct unlawful.

2 On the other hand, there is case law out there which would suggest to these officers  
 3 and security personnel that the nation has a “compelling interest” in maintaining the security  
 4 around bases housing nuclear weapons. That being the decision where the Jesuit Priest led  
 5 a group of protestors onto a sensitive nuclear submarine base to commit “nonviolent acts of  
 6 prophetic witness against the governments possession of nuclear weapons.” *United States v.*  
 7 *Kelly*, 2019 WL 4017424, at \*1 (S.D. Ga., Aug. 26, 2019), aff’d sub nom., *United States v.*  
 8 *Grady*, 18 F.4th 1275 (11th Cir. 2021); (*see also*, Defs’ Mot. Dismiss (#54), pp. 12-13,  
 9 ll. 23-23) (discussing same). And there, after recognizing the danger that the security  
 10 battalion charged with protecting the critical facilities, infrastructure and strategic assets  
 11 present on the base would be forced to use lethal force, the court further expounded on the  
 12 danger which unauthorized intruders could present to national security in such areas.

13 Even when security personnel responding to unauthorized  
 14 intruders does not lead to lethal results . . . such an incident puts  
 15 the entire security contingent on that installation on alert, which  
 16 is disruptive to normal day-to-day operations associated with the  
 operation of the base. Such disruption has the ability to impact  
 operations that are directly in support of our nation's strategic  
 deterrence programs, timelines, and policies and procedures.

17 *United States v. Kelly*, 2019 WL 4017424, at \*5.

18 This “compelling interest” in protecting the nation’s security indicates just one more  
 19 reason why the decision to shoot was reasonable and justified under the circumstances.  
 20 Moreover, the arguments presented by SOC and Harris in their Motion to Dismiss (#69),  
 21 which these Defendants have now joined, even more so evince the reasonableness of the  
 22 shooting as further exhibited by the compliance with an entire series of federal rules and  
 23 regulations by these Nye County Defendants. This compliance with the rules applicable to  
 24 the NNSS also militates a finding a qualified immunity. “Foreign policy and national  
 25 security decisions are delicate, complex, and involve large elements of prophecy’ for which  
 26 ‘the Judiciary has neither aptitude, facilities, nor responsibility.’” *Hernandez v. Mesa*,  
 27 \_\_\_ U.S. \_\_\_, \_\_\_, 140 S. Ct. 735, 749, 206 L. Ed. 2d 29 (2020).

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1        But returning to the point at hand, it was Plaintiffs' burden to identify even a single  
 2 precedent finding a Constitutional violation under similar circumstances. Plaintiffs failed  
 3 to do so. Under the new Supreme Court precedent reflected in both *Rivas-Villegas v.*  
 4 *Cortesluna* and *City of Tahlequah, Oklahoma v. Bond*, Defendant Kakavulias and the other  
 5 involved officers must therefore be afforded qualified immunity.

6        **B. This shooting was reasonable under the totality of the circumstances.**

7        Defendants have been loathe to engage in a scrap with Plaintiffs over factual minutia  
 8 that could be relevant to a Fourth Amendment reasonableness analysis had these events  
 9 occurred on a city street, but are stripped of their relevance on this federal enclave due to  
 10 proximity of these events to part of the nation's nuclear arsenal and deterrence. But to the  
 11 extent the Court feels it may examine any and all of this evidence under the hearsay and other  
 12 exceptions cited above, there are some points in reply that warrant discussion.

13       First, all the evidence, especially the evidence from the officers who were right there  
 14 in the line of fire, indicates that Mr. Graves' hands were secreted behind his back when  
 15 deadly force was employed. This evidence is also supported by the fact that Mr. Graves had  
 16 something to hide, namely a brass-knuckle knife and some sort of transmitter which may  
 17 have been mistaken for a detonator. Defendants devoted two pages to the statements of  
 18 Rachel McDonald because Plaintiff's reliance in the complaint to her statement, and in  
 19 particular the critical reference to the decedent's hands being at his sides. (*See*, Pls'  
 20 Compl. (#35), p. 19, ll. 14-16). When that statement was expounded, it revealed she wasn't  
 21 sure of anything. And as to Chris Rivers' statement regarding the decedent "erratically  
 22 waiving his hands in the air," it simply is not relevant because that was not proximate to the  
 23 employment of deadly force.

24       A close examination of Rivers' statement reveals these comments concerned only the  
 25 first stop, where Mr. Graves had his tire shot out. Hence Rivers' witness to the single "pop"  
 26 followed by the continued pursuit. (*See*, Pls' Opp. Brief (#75), p. 26) (#NYE-00122).  
 27 Mr. Rivers did not witness the shooting of the suspect. *Id.* And there is plenty of case law  
 28 reflecting justified shootings of suspects who refused to show their hands. *Sumner v. City*

1       of Winfield, Kan., 2009 WL 873010 (D. Kan., Mar. 30, 2009) (suspect refused to get on the  
2 ground and to show his hands when ordered to do so and continued advancing on officer);  
3       *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1037-38 (9th Cir. 2018) (law was not clearly  
4 established, at time of the incident, that police officer's conduct in firing a shot at suspect  
5 who was holding a knife a fraction of a second before officer came within striking distance  
6 of him violated suspect's Fourth Amendment right to be free from deadly force); *Trevino v.*  
7       *Trujillo*, 756 F.App'x 355, 359 (5th Cir. 2018) ("[T]his court has found no material fact issue  
8 to preclude a finding of qualified immunity when the shooting officer could not see the  
9 suspect's hands and the suspect moved his hands while they were out of the officer's line of  
10 sight."); *Manis v. Lawson*, 585 F.3d 839 (5th Cir. 2009) (even if officer used excessive force  
11 in violation of suspect's Fourth Amendment rights by fatally shooting him as he sat in vehicle  
12 idling on railroad tracks and, in defiance of orders from police to show his hands, reached  
13 under seat, officer was qualifiedly immune from § 1983 liability due to probable cause to  
14 believe suspect posed serious threat).

15 Plaintiffs also contend it was “sheer speculation that Kakavulius had a heightened  
16 sense of awareness regarding the operations of the NNSS.” (See, Pls’ Opp. Brief (#75),  
17 p. 18, ll. 19-20). But the purported statement of Deputy Kakavulius shows he plainly  
18 understood what was at stake.<sup>3</sup> Specifically, Deputy Kakavulius was aware of the presence  
19 of nuclear weapons and fearful that Mr. Graves might be attacking the facility. He was also  
20 fearful of the safety of employees leaving other nuclear facilities. (See, Pl’s Opp.  
21 Brief(#75), p. 37 and 38 of 41) (Kakavulias “transcription”). And as for why the deputy shot  
22 when he did, the statement is both believable and understandable, even according to the  
23 version proffered by Plaintiffs’ counsel:

24 | //

26       <sup>3</sup>. Plaintiffs' counsel represents in a Declaration that this evidence is a "true and correct  
27 copy of a transcription of an interview with Defendant John Kakavulias," but more accurately it  
28 seems to be a compilation of Plaintiffs' counsel's own notes, thoughts and argument regarding  
the contents of that audio recording. (See, Padda Decl., ¶ 3) (mistakenly identifying the  
Kakavulias "transcript" as "Exhibit A" when it is actually attached as "Exhibit D."). It should be  
disregarded as a result, along with Plaintiffs' arguments on this point.

1                   Kakavulius: He kept coming closer to me...at this point I was  
2 literally afraid that if he took another step I was  
3 gunna [sic] find out what he had behind his back  
4 because he was right by the front of this vehicle  
5 and that's when I fired my rounds at him...same  
6 time security fired theirs.

7                   Wynn: [W]hy did you fire your weapon?

8                   Kakavulius: [B]ecause I was afraid that if he took one more  
9 step, that he was gunna [sic] pull something out  
10 from behind his back, and he was gunna [sic] try  
11 to kill m[e] or him-the security guard next to me  
12 and I was afraid at this point.

13                  (See, Pls' Opp. Brief (#75), p. 38 of 41) (Kakavulias "transcript").

14                  Finally, Plaintiffs make numerous complaints about Defendants' failure to attach the  
15 main contract between Nye County and the NNSS. (See, e.g., Pls' Opp. (#75), p. 19 of 41,  
16 ll. 1-12). Contrary to Plaintiffs' accusations, Defendants can assure both the Court and the  
17 Plaintiffs that there is a contract out there between the NCSO and the DOE, and that it  
18 effectively renders these Defendants' brothers-in-arms with co-Defendants SOC and Harris  
19 as members of the same overarching security force on the NNSS. Its contractual provisions  
20 also strongly support the position that Nye County and its Deputies should be afforded those  
21 same federal privileges and immunities as their co-defendants and fellow security force  
22 officers with the SOC. Unfortunately, even if there were a Protective Order in place, the Nye  
23 County Defendants are contractually and legally bound to first obtain federal permission to  
24 release any portion or copy of that contract or its provisions. However the contract attached  
25 to the underlying motion is evidence that such a more extensive agreement exists and allows  
26 the deputy sheriffs to operate as part of the security force on the NNSS premise. See, (#54-2,  
27 pp. 2 and 3 of 3).

28                  There is sufficient evidence, intertwined with the allegations of the complaint, which  
29 may be properly considered so as to grant qualified immunity to these Defendants on their  
30 underlying motion to dismiss. Defendants ask that such motion be granted.

31                  ///

32                  ///

### III. CONCLUSION

The Nye County Defendants have demonstrated that Plaintiff cannot show a constitutional violation under their current allegations, and that Deputy Kakavulias is entitled to qualified immunity regardless. Since no constitutional violation is shown, there is no *Monell* liability cast against Nye County. For these reasons, these movants respectfully request dismissal based on FRCP Rules 12(b)(1) and 12(b)(6).

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of February, 2022.

ERICKSON, THORPE & SWAINSTON, LTD.

/s/ Brent Ryman

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1                   **CERTIFICATE OF SERVICE**

2                   Pursuant to FRCP Rule 5, I certify that I am an employee of ERICKSON, THORPE &  
3 SWAINSTON, LTD. and that on this day I caused to be served a true and correct copy of the  
4 attached document by:

- 5                    U.S. Mail  
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9                   addressed to the following:

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21                  DATED this 18<sup>th</sup> day of February, 2022.

22                  \_\_\_\_\_  
23                  /s/ Brent Ryman  
24                  Brent Ryman